89-119

No.

IN THE
Supreme Court of the United States
October Term, 1989

UNITED STATES OF AMERICA,

Appellee,

-against-

HUMBERTO GARCIA,

Petitioner-Appellant.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

1. Should the cocaine have been suppressed because no valid predicate existed for the stop and concomitant search of appellant's vehicle?

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CASES CITED

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TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner-Appellant, HUMBERTO GARCIA, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered on May 15, 1989, which affirmed the conviction of appellant HUMBERTO GARCIA for conspiracy to distribute cocaine and possession of cocaine with intent to distribute, in violation of Title 21 U.S.C. 846, 841(a)(1), 841(b)(1)(6) and 846.

OPINION BELOW

After indictment, appellant pleaded not guilty and requested suppression of the cocaine seized on the grounds that the seizure of the evidence stemmed from a violation

of his constitutional rights. A hearing was conducted after which the motion to suppress was denied in an oral opinion issued from the bench. Appellant pleaded guilty to both counts of the indictment, specifically reserving his right to appeal. The decision issued by the District Court is set forth in the appendix.

The judgment of conviction was affirmed by the Court of Appeals for the Second Circuit in a determination filed on May 15, 1989.

The opinion of the Court of Appeals was not officially reported. The summary order issued by the Court is set forth in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 15, 1989. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved in the case at bar is the Fourth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The appellant, after having been indicted, moved to suppress the cocaine seized on the ground that it was seized in violation of his Fourth Amendment rights, and after

the District Court denied that motion following a hearing, was convicted upon his plea of guilty to conspiracy to distribute cocaine and of possessing cocaine with intent to distribute. On November 23, 1988, appellant was sentenced to a term of imprisonmnt of fifty-one (51) months.

THE MOTION TO SUPPRESS

The testimony at the hearing on the motion to suppress established that while Special Agents of the Drug Enforcement Administration were conducting a surveillance of an auto repair shop in Queens, New York, they noticed a Mercury double-parked, two (2) to three (3) car lengths in front of their car. A few minutes later, a red Hyundai, driven by appellant, HUMBERTO GARCIA, doubled parked behind the Mercury.

Appellant was seen exiting his car, entering the Mercury and then returned to the Hyundai, carrying a brown attache case. Appellant and his passenger seemed to be "doing something with the bag." Appellant returned to the Mercury and it drove off. When it stopped at a red light, appellant exited without the bag and walked back to the Hyundai.

A subsequent stop of the Mercury revealed a large sum of cash. After receiving that information, other agents pulled alongside the Hyundai, identified themselves, and told appellant to pull his car to the curb.

When appellant tried to drive off, Special Agent Tully jumped out of his car, drawing his weapon and pointing it at appellant's car. Appellant stopped and was placed under arrest. A search of appellant's car revealed a plastic bag containing cocaine. Agent Tully admitted at the hear-

ing that he had no reason to believe the car had any connection to the garage at which they were conducting a surveillance.

REASONS FOR GRANTING THE WRIT

THE COCAINE SHOULD HAVE BEEN SUPPRESSED BECAUSE PROBABLE CAUSE WAS LACKING FOR THE STOP OF APPELLANT'S CAR OR ITS CONCOMITANT SEARCH.

In the case at bar, this Court is confronted with a Court of Appeals decision of the Second Circuit which is clearly in conflict with the import of prior decisions of this Court. It is axiomatic that if an arrest is made without a warrant, it is unlawful unless made upon probable cause. *Dunaway v. New York,* 442 U.S. 200, 208, 99 S.Ct. 2248, 2254, (1979). A mere suspicion is not enough. There must be an actual probability, not a mere possibility that the defendant is engaged in criminal activity. *Beck v. Ohio,* 379 U.S. 89 (1964). "The quantum of evidence required to establish probable cause to arrest need not reach the level of evidence necessary to support a conviction . . . but it must constitute more than rumor, suspicion, or even a strong reason to suspect." *United States v. Fisher,* 702 F.2d 372, (2d Cir. 1983), citing *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, (1963); *Henry v. United States,* 361 U.S. 98, 101, 80 S.Ct. 168, 171 (1959).

It is clear that the agents did not ahve probable cause to arrest appellant. Simply, nothing happened that indicated criminal activity. Three men meeting in cars and exchanging money—and nothing else—simply is insufficient to establish probable cause to believe a crime was being committed. To find otherwise, requires stretching one's imagination to its limits. "The inarticulate hunch,

the awareness of something unusual, is reason enough for officers to look sharp. Their knowledge and experience identify many incidents in the course of a day that an untrained eye might pass without any suspicion whatsoever. But awareness of the unusual and a proper resolve to keep a sharp eye, is not the same as an articulated suspicion of criminal conduct." *United States v. Montgomery,* 561 F.2d 875, 879, (D.C.N.Y.) cited in *United States v. Price,* 599 F.2d 500, n. 7. The Court of Appeals was in error in deciding that the agents had probable cause to arrest appellant.

Since the case at bar presents this Court with a case in which the United States Court of Appeals for the Second Circuit has decided a Federal Constitutional question in a way which conflicts with the applicable decisions of this Court the petition should be granted.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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APPENDIX A—TRANSCRIPT OF DECISION OF SUPPRESSION HEARING BEFORE THE HONORABLE C.P. SIFTON, UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

EFRIN ROBLES,

Defendant.

CR 88-00350

United States Courthouse
Brooklyn, New York

August 16, 1988
9:30 a.m.

APPEARANCES:
For the Government:
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Proceedings recorded by mechanical stenography, transcript produced by Computer Aided Transcript

THE COURT CLERK: USA-vs-Efrin Robels, Wilfredo Garcia and Humberto Garcia.

(Patricia Michelsen, the interpreter, is sworn in by the Court)

MR. SCHMUKLER: May I apologize for being late your Honor.

THE COURT: Sure. What happened was, when you weren't here, I got involved with something else, which is why we have been delayed as long as we have.

MR. SCHMUKLER: I forgive you, if you forgive me.

THE COURT: All Right.

Anything further that has occurred to anyone over the course of the evening? If not, I'm prepared to decide the pending motions.

I'm going to deny the motion to suppress for the following reasons:

First of all, it appears to me that the—bring the defendants out, please.

(The defendants are brought into the courtroom).

THE COURT: Okay. I apologize for starting in your absence. With everybody here in the courtroom, I had assumed that you were already here.

As I indicated a moment ago, I have determined to deny the motion to suppress evidence for reasons which I will explain.

First of all, it appears to me that the stop of the Mercury and its occupant, Mr. Robles was justified. It seems to me that at the time of the stop, there was not only reasonable grounds to suspect a crime was being committed by the occupant of the Mercury, but indeed probable cause to believe that a crime had occurred. The factors that went into that state of mind were the fact that the transaction that was witnessed by the surveilling agents pccirred om tje vicinity of a garage, which is very reliable informant had connected with very recent large scale drug trafficking. The scale of the reafficking, it seems to me, ties in with the type of transaction that was thereafter witness in the vicinity of this garage.

The transaction witnessed by the surveiling agents, they had ample ground to conclude was a transfer of money and drugs, and an innocent explanation of this transfer, I must say, I find hard to see. What the serveilling agents witnessed was the empty handed occupant of the Hyundai drove up behind the Murcury, whose occupant was quite apparently waiting for the Hyundai, entered the Hyundai, gets an attache case, which incidentally at a point prior to what the parties have considered

the arrests here, is identified as an attache case not only belonging to the occupant of the Murcury, but having his wallet in it. This attache case with presumably the wallet and its contents was then returned to the Hyundai, where the occupants of the Hyundai engaged in activities which the surveiling agents were again quite reasonable in concluding constituted the removal of one of the items involved in the transfer, and the insertion of the other item being transferred and exchanged.

The Hyundai occupant then returns to the Mercury, doesn't simply leave off the attache case, and return, gets into the Mercury, and stays there long enough, it's not entirely after the fact hindsight to conclude was the checking of contents of the attache case to see what had been put in it, and that what was put in it was what was expected. That accomplished, the occupants of the Hyundai leaves the Mercury, drives off. The driver of the Mercury checks in the mirror who is behind him. Of course in isolation, looking in the mirror is simply prudent driving behavior, but in the context of all of the other circumstances, the agent seems to me well warranted in attributing significance to the fact that he was being looked at or watched.

The Mercury was then stopped, looked at, if it makes a difference, to distinguish this between a stop and arrest, it does seem to me that it started out at what the case is considered a stop. No gun was drawn. There were not a sizable number of cars blocking the movememt of the Mercury. The initial intrusion was indeed a limited intrusion, that is, a request for a driver's license and registration.

Following the consent, which I find was voluntary to retrieve the license from the attache case, the agend discovered sizable amounts of packed cash, The fact that

it was in packets with rubber bands is of some significance, an indicating that this was what the agents affected the arrest.

The sums of money, I find, were discovered in plain view, along with the driver's license and wallet, which as, I say,had some significant role in increasing the level of belief that s crime was being committed, since it made apparent that a few minutes earlier this driver's license and wallet had been traveling in the breifcase between these two cars, indicating that the driver of the Mercury certainly expected to get his briefcase back, and at the point of transferring the briefcase between the cars, was to affect the concealed transfer of drugs.

Once the money was found in the Mercury, there was clearly grounds to stop and arrest the Garcias in the Hyundai, and it really doesn't make too much difference, it seems to me, where the agents, had they started in the other direction and stopped the Hyundai first then discovered that the narcotics could have gone the other way around. So, I don't find a great deal of significance in which went first.

The attempted flight of the Hyundai, of course, added to the probable cause with regard to the stopping of the Hyundai. The cocaine, it seems to me, was appropriately discovered pursuant to the automobile exception to the search warrant requirements, and in any event was in the scope of grab area of the people being arrested.

The search of the the Robles' apartment was effected pursuant to what I find to be a voluntary and knowing consent of a person authorized to give it, and the fact that the access to the apartment was gained through a public area, it was gained through opening the locked door to a

public area in the building, doesn't seem to me to invalidate the search of the apartment, whether it's appropriately called a public area or common space of the apartment building, and it doesn't seem to me following the Circuit's decisions in such cases as *United States against Holland,* 755 F. 2d 253, doesn't seem to me that the defendant has established a privacy interest in the area sufficient to withstanding the complaint of the police' officers entry through the hallway or vestibule.

Okay. As I said, I would give you an opportunity to confer among yourselves as to how you would like to proceed, and when you are ready, you can tell Mr. Kessler, and I will come back.

APPENDIX B—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of May, one thousand nine hundred and eighty-nine.

Present:
Hon. James L. Oakes,
Chief Judge,
Hon. Thomas J. Meskill,
Hon. John M. Wisdom,*
Circuit Judges.

United States of America,

Appellee,

v.

Humberto Garcia,

Defendant-Appellant.

88-1540
88-1541

ORDER

This is an appeal from a judgement of the United States District Court for the Eastern District of New York, Charles P. Sifton, *Judge,* denying Humberto Garcia's motion to supress evidence. We affirm the district court's ruling, which is entitled to great deference on appeal. *United States v. Benevento,* 836 F.2d 60, 67 (2d Cir. 1987), *cert. denied,* 108 S. Ct. 2035 (1988).

*Of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

Given that the agent who arrested Garcia was sitting outside a building in which he strongly suspected that cocaine was stored and sold; that the agent saw Garcia transfer a briefcase from one car to a second car, then return the breif case after apparently removing something from it; and that the car to which the briefcase was returned was subsequently found to contain large amounts of cash, we conclude that there were "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrent the intrusion" of this investigatory stop. *Terry v. Ohio,* 392 U.S. 1, 21 (1968).

When the agent tried to stop the car which Garcia was driving, Garcia attempted to evade him, stopping only when the agent planted himself in the path of the oncoming car and aimed his gun at the car's occupants. This behavior, together with what the agent had already observed, establishes probable cause for an arrest. *See Illinois v. Gates,* 462 U.S. 213, 243-44 n.13 (1983) (probable cause requires probability of criminal activity, not actual showing of such activity); *see, e.g., United States v. Torres,* 740 F.2d 122, 128 (2d Cir. 1984), *cert. denied,* 471 U.S. 1055 (1985); *United States v. Ocampo,* 650 F.2d 421, 429 (2d Cir. 1981)

The ssme circumstances that gave the agent probable cause to arrest Garcia gave him probable cause to believe that the car contained narcotics. The agent therefore did not need a warrant to search the car, and the narcotics found therein were admissible. *United States v. Ross,* 456 U.S. 798, 805-06 (1982). The fact that the behavior observed by the agent might, by some stretch of the imagination, have been consistent with Garcia's innocence dies not

negate probable cause. *United States v. Webb, 623 F.2d 758, 761 (2d Cir. 1980).*

The judgement affirmed.

s/ James L. Oakes
James L. Oakes, Chief Judge.

s/ Thomas J. Meskill
Thomas J. Meskill,

s/ John M. Wisdom
John M. Wisdom, Circuit Judges.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

A TRUE COPY
ELAINE B. GOLDSMITH
Clerk